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No. 88-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALEJANDRO HERNANDEZ,
Cross-Petitioner,

v.

DIANELLA SHIPPING CORPORATION,
IN PERSONAM, and M/V RAJAAN,
Her Engines, Tackle, Apparel, Etc.,
IN REM,
Cross-Respondents.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether *Culver v. Slater Boat Company*, 722 F.2d 114 (5th Cir. 1983), known as *Culver II*, requires that only actual past earnings be considered by the finder of fact in awarding damages for loss of future earnings.

PARTIES INVOLVED

Pursuant to Rule 21.1(b), Rules of the Supreme Court, counsel for Cross-Petitioner certifies that the following is a list of all parties to the proceeding in the Court whose judgment is sought to be reviewed:

1. Alejandro Hernandez
2. Dianella Shipping Corporation
3. Ishikawajima Harima Heavy Industries, Ltd.
4. O.J.I. Seke-Kogyo Kabushinki Kaisha
5. Cargill Inc.
6. Brazos River Harbor Navigation District
7. Affiliated Rice Mills
8. Trans Ocean America, Inc.
9. Langston Companies, Inc.
10. Amoco Fabrics Company
11. Patchogue Plymouth Division
12. Euro Grain Trading, Ltd.
13. General Produce and Fibres, Ltd.
14. West Texas Rice Company
15. Synthetic Industries Texas, Inc.
16. Texas Employers' Insurance Association
17. The West of England Ship Owners Insurance Services Limited.
18. American International Underwriters

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CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on March 30, 1988 as modified by the per curiam opinion dated June 20, 1988.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the district court dated August 5, 1985 are unreported, but are attached hereto as Appendix A. The original opinion of the Court of Appeals of the Fifth Circuit affirming in part, vacating in part, and remanding to the District Court, is reported at 841 F.2d 582 (5th Cir. 1988), and is attached as Appendix B. The subsequent per curiam opinion of the Court of Appeals for the Fifth Circuit modifying the original opinion and response to the Petition for Rehearing is reported at 848 F.2d at 498 (5th Cir. 1988), and it is attached as Appendix C.

JURISDICTION

Dianella's statement of jurisdiction in its Petition for Writ of Certiorari is correct. In addition, in accordance with Rule 19.5, Cross-Petitioner Hernandez received the Petition for Writ of Certiorari on October 18, 1988, and this Cross-Petition for Writ of Certiorari is being filed within thirty days of receipt.

FEDERAL STATUTES INVOLVED

The following United States statute is involved in this case: The Longshoreman and Harbor Workers' Compensation Act, in pertinent part: 33 U.S.C.A. §905(b) (West 1986).

STATEMENT OF THE CASE

Alejandro Hernandez is a thirty-four year old (at the time of trial) Mexican national who was working as a longshoreman aboard the M/V RAJAAN in Freeport, Texas, on September 21, 1983. Mr. Hernandez

initially came to the United States in 1970, and lived here continuously since that time except for several brief occasions, most recently in 1978, when he was returned to Mexico by the Immigration and Naturalization Service. He has six children, three of whom were born in the United States and are American citizens. (Vol. 17, p. 12).

At the time of the accident, Mr. Hernandez had been working full time as a longshoreman since 1979 (Vol. 17, p. 8), and carried a classification card from the ILA Local #30 (Vol. 17, p. 31). He worked whenever he could between 1979 and the date of his accident, but there were periods of time when he was unable to work because work was slow and his seniority was still low. (Vol. 17, p. 9). Had he not been injured, he would have continued to gain seniority and would have worked regularly even when times were slow. (Vol. 17, p. 10). His intention was to continue working as a longshoreman for the remainder of his life. (Vol. 17, p. 9).

Mr. Hernandez and the other crew members were loading palletized rice into the number two hold of the M/V RAJAAN at the time of the accident. Loading had commenced on the previous day, September 20, and the ship's hydraulic winches were being used to load the cargo. Beginning at the commencement of operations on the afternoon of September 20th, the starboard winch control at hatch number two, forward, began to malfunction, resulting in a jerk or sway of the pallets of rice that were being loaded. This defective condition was brought to the attention of the ship's crew, which pumped fluid into the hydraulic winch control system, then advised the stevedore that the winch was repaired and it was safe to

go back to work. (Vol. 14, p. 34-35) The winch continued to malfunction and cause the pallets of rice to jerk, and this problem was again brought to the vessel's attention early the next morning, September 21st. The ship's engineers again pumped hydraulic fluid into the winch control, and promised the stevedore that it was now fixed and they could go back to work. (Vol. 13, p. 109-110; Vol. 14, p. 36). The problems with the winch continued throughout the day, and were repeatedly reported to the ship's crew, which finally attempted a third repair of the winch control system around 3:00 p.m. on September 21st, again pumping hydraulic fluid into the control. Although the evidence is overwhelming that the starboard winch control system was leaking fluid (Vol. 11, p. 13; Vol. 13, p. 157, 160; Vol. 14, p. 105-106), the vessel never made any attempt to locate the leak or to effect a permanent repair.

Approximately one hour before the accident, the stevedore's walking foreman advised the chief mate of the vessel that the winch control was a danger, that he preferred not to work with it, and if it was not permanently fixed, someone was going to get hurt. (Vol. 14, p. 38). After pumping more hydraulic fluid into the winch control, the ship's crew promised the stevedore foreman that the winch was finally repaired, and that it was safe to work. Mr. Hernandez was injured when the winch again malfunctioned about one hour later. The malfunction of the winch which caused Mr. Hernandez to be injured was the same problem that had been occurring with the winch throughout the loading of the vessel. (Vol. 14, p. 43).

From Freeport, Texas, the vessel sailed to Pensacola, Florida, to load more rice. The ship's winches

were again used to load the rice, and the starboard winch control at number two hatch, forward, continued to malfunction. (Vol. 14, pp. 153, 172). The ship's crew was again notified of the malfunction in Pensacola, and it was necessary for the crew to pump hydraulic fluid into the winch control as many as 10 or 15 times to keep it working. (Vol. 14, pp. 158-159).

After several days of loading in Pensacola, the Chief Engineer of the M/V RAJAAN instructed the vessel's Second Engineer to remove the number two forward winch controller, which had been malfunctioning in Freeport and in Pensacola, and to switch it with the remote control system located at number six hatch. The Chief Engineer specifically instructed the Second Engineer, who was responsible for maintaining an accurate log book for the vessel, that no entry was to be made in the log relating to this repair of the winch controller. (Deposition of Murtaza Yahya, Second Engineer, Plaintiff's Ex. 39, pp. 104-106).

The vessel's Second Engineer testified that he realized while the ship was in Freeport that pumping hydraulic fluid into the winch control system was not going to solve the problem (Yahya, p. 175), but that the Chief Engineer had instructed him to pump the fluid in in order to "put on a show" for the longshoremen, and to make them think that something was being done to solve the problem. (Yahya, p. 153).

Approximately one hour after the last "show," the starboard winch control at hatch number two again malfunctioned, causing the pallet to jerk, and dislodging a bag of rice which struck Mr. Hernandez. It is undisputed that it was the winch malfunction that caused the accident; even the vessel's Second

Engineer testified that any problems with the winch on September 21st would not have been caused by the winch operator, who was operating the winches properly. (Deposition of Yahya, p. 119).

Mr. Hernandez suffered a crushing spinal cord injury at the level of T-4 resulting in total and permanent paralysis below the level of his nipples. He has no bowel, bladder or sexual function. He also suffered brachial plexus injuries to his shoulders causing diminished use of and sensation in his arms. He was diagnosed as having a spinal cyst, which may cause further paralysis or require further treatment in the future. He is permanently confined to a wheelchair.

As a result of his injuries, Mr. Hernandez was rendered totally disabled to engage in gainful employment. The Court heard testimony that Mr. Hernandez was earning $14.00 per hour at the time of his injury, establishing an earning capacity of $28,000 per year, although his actual earnings had been less due to his low seniority. Additionally, the Court heard testimony that the average wages of a longshoreman, according to U.S. Government tables, was $23,000 per year. The Court used this lower earning capacity figure in arriving at its fact finding regarding lost future earnings. The experts testifying in behalf of both Mr. Hernandez and Dianella agreed that Mr. Hernandez will need attendant care and special transportation as a result of his injuries. The extent of his injuries has made the performance of basic household services impossible for Mr. Hernandez. He has received extensive medical care under the direction of Dr. William Donovan of the Texas Institute for Rehabilitation and Research in Houston, Texas, and Dr. Donovan will

continue to care for Mr. Hernandez for the remainder of his life.

SUMMARY OF THE ARGUMENT FOR ALLOWANCE OF THE WRIT

The trial court correctly calculated the pecuniary damages based on the evidence of wage earning capacity. The pecuniary damages awarded by the trial court are well supported by the evidence and calculated in accordance with *Culver II*. The Court's award of lost future earnings was properly based upon all of the facts, including Mr. Hernandez' earnings prior to his injury, which bear on his lost earning capacity. The Court of Appeals erred in holding that the only facts upon which a damage award for lost earning capacity may be supported are the actual earnings of the Cross-Petitioner prior to his injury.

ARGUMENT

The Court of Appeals erred in holding that *Culver II* requires the finder of fact to use the gross earnings at the time of injury as the exclusive facts in determining an award of damages for lost earning capacity.

The Court of Appeals held that only the actual earnings at the time of injury may legally be considered in determining loss of future earning capacity. This is an incorrect application of *Culver II*. This Court has stated clearly: "The estimate of the loss from lessened earning capacity in the future need not be based solely upon the wages which the plaintiff was earning at the time of his injury." *Jones & Laughlin Steel Corp. v. Pfeiffer*, 462 U.S. 523, 535, 76 L.Ed.2d 768, 103 S.Ct. 2541 (1983).

Mr. Hernandez' wage at the time of injury is the logical starting point, but as *Pfeiffer* clearly shows, damage must be based upon the plaintiff's lost earning *capacity*. Other relevant evidence is properly received to determine that loss of capacity. This Court, in *Wood v. Diamond M Drilling Co.*, 691 F.2d 1165, 1169 (5th Cir. 1982), specifically approved of this analysis of loss of earning capacity:

> "It is not the status of the immediate present which determines *capacity* for remunerative employment. Where permanent injury is involved, the whole span of life must be considered. It must be determined whether or not the economic horizon of the plaintiff has been shortened as a result of defendants' negligence." [emphasis supplied]
> Quoting *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 452 F.Supp. 841, 846 (N.D. Pa. 1978).

Indeed, in *Wood*, supra, this Court allowed a substantial award for loss of future earnings even though the plaintiff was earning more at the time of trial than he had prior to his injury. Clearly, past wage history is not the only consideration in setting damages. Furthermore, the Fifth Circuit has held that a labor market survey is sufficient evidence to establish plaintiff's earning capacity,[1] further supporting the use of facts other than plaintiff's earnings prior to his injury as a basis to establish lost earning capacity. *Knight v. Texaco, Inc.*, 786 F.2d 1296, 1300 (5th Cir. 1986).

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[1] In this case, Dr. Dillman used U.S. Government tables regarding wages of longshoremen and material handlers to establish earning capacity in the future.

Nowhere is the premise more clearly stated than in *Culver v. Slater Boat Co.*, 722 F.2d 114, 120 (5th Cir. 1983) known as *Culver II*: "Arriving at a reasonable estimate of anyone's financial future involves estimates of a whole spectrum of factors."

The evidence as to Mr. Hernandez' earning capacity prior to his injury and the damage he sustained as a result of the loss of that capacity was well established. The undisputed evidence showed Mr. Hernandez was earning $14.00 per hour as a longshoreman at the time of his injury, which figure translates to an annual salary of $28,000.00.[2] (R. Vol. 16, Tr. p. 165; R. Vol. 17, Tr. p. 10). It was further undisputed that Mr. Hernandez intended to work as a longshoreman for the rest of his life. (R. Vol. 17, Tr. p. 9). Rather than stop there and reduce this sum to present value, Dr. Dillman looked further into Mr. Hernandez' earnings in prior years, finding they were substantially less than the full time worker was capable of earning. (R. Vol. 16, Tr. p. 165).

Recognizing that Mr. Hernandez' work as a longshoreman was done within a system of seniority, with Mr. Hernandez having only three years seniority, Dr. Dillman arrived at a figure that would best represent earning capacity over a thirty-year period. (R. Vol. 17, Tr. p. 9-10, 31; R. Vol. 16, Tr. p. 165, 167). To accomplish this, he consulted U.S. Government figures which showed the average annual earnings of a

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[2] It appears that a strict and literal reading of the shipowner's argument regarding future lost earnings would justify stopping the analysis of Mr. Hernandez' earning capacity at this point (i.e., his wage at the time of injury) and calculating lost earning capacity on the basis of $28,000.00 per year. However, further analysis by Dr. Dillman reduced this figure, as seen above.

longshoreman to be a little over $23,000. (R. Vol. 16, Tr. p. 166, 167). The use of this figure from a U.S. Government table is not only appropriate and acceptable under the 5th Circuit's holding in *Knight, supra*, but is justified on independent grounds. It is well established, both in *Pfeiffer, supra*, and *Culver II, supra*, that non inflationary increases in wages, such as productivity or the age earning cycle, may be added to the plaintiff's wages to determine his future lost earnings. As Dr. Dillman explained, the figures from the U.S. Government tables included this age earning cycle as it was an average over the entire earning cycle. Therefore, an independent calculation of this factor tending to increase Mr. Hernandez' future wages was not necessary as a result of using the government figures. (R. Vol. 16, Tr. pp. 169-170). Using this figure, Dr. Dillman correctly calculated Mr. Hernandez' lost earning capacity after deducting federal income taxes and properly applying the below market discount rate as required by *Culver II*.

Based upon this evidence, the Trial Court's Finding of Fact No. 46 (Appendix A, p. 12a) is a proper determination of Mr. Hernandez' loss of earning capacity. Far from being clearly erroneous, it is well supported by competent, reliable evidence.

CONCLUSION

The Court of Appeals erred in vacating that portion of the district court's judgment pertaining to lost wages and suggesting a remittitur in the amount of $689,925.00 or a new trial. For the reasons stated, the Cross-Petition for Writ of Certiorari should be granted and the Judgment of the Court of Appeals regarding lost wages should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-5731

ALEJANDRO HERNANDEZ

v.

M/V RAJAAN, her engines, tackle, etc., *in rem*, and DIANELLA SHIPPING CORP.

v.

ISHIKAWAJIMA-HARIMA HEAVY INDUSTRIES, LTD.; CARGILL, INC.; BRAZOS RIVER HARBOR NAVIGATION DISTRICT; AFFILIATED RICE MILLS; TRANS OCEAN AMERICA, INC.; LANGSTON COMPANIES, INC., CONTINENTAL BAG DIVISION; AMOCO FABRICS CO.; EURO GRAIN TRADING, LTD.; GENERAL PRODUCE AND FIBRES, LTD; WEST TEXAS RICE CO.; O.J.I. SEIKE-KOGYO KABASHIKI KAISHA; and SYNTHETIC INDUSTRIES TEXAS, INC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having been tried upon the facts without a jury, the Court hereby enters the following Findings of Fact and Conclusions of Law, pursuant to Rule 52(a), F. R. Civ. P.

FINDINGS OF FACT

1. Plaintiff Alejandro Hernandez is a thirty-two year old Mexican citizen who was employed as a longshoreman by Young & Company, a contracting stevedore, when he was injured working aboard the M/V RAJAAN on September 21, 1983, near Freeport, Texas.

2. The M/V RAJAAN is a combination bulk carrier, general cargo ship of Liberian registry which was owned by Defendant (and Third-party Plaintiff) Dianella Shipping Corporation ("Dianella") on September 21, 1983. The ship has six cargo holds, and it is equipped with hydraulic winches which serve these holds. The winches have a hydraulic remote control system to allow operation of both winches by a single worker. The winches and remote control system are located atop the vessel's mast houses.

3. Third-party Defendant Ishikawajima-Harima Heavy Industries Company, Ltd. ("IHI") is the Japanese company which built the M/V RAJAAN and manufactured the hydraulic winches.

4. Third-party Defendant O.J.I. Seiki-Kogyeo Kabashiki Kaisha ("OJI") is the Japanese corporation which made the Marol Hydraulic Remote Control System ("the remote control") installed onboard the M/V RAJAAN. IHI purchased the remote control from OJI for use on the vessel.

5. Third-party Defendant Affiliated Rice Mills ("Affiliated") is a successor in interest to Third-party Defendant West Texas Rice Company, for all purposes of this lawsuit. Affiliated is a business located in Alvin, Texas which mills and bags rice for shipment overseas.

6. Affiliated used polypropylene sacks for the shipment of rice aboard the M/V RAJAAN during the timeframe material to this lawsuit. At its plant, Affiliated filled the polypropylene sacks with rice and stowed them on wooden pallets in a cross-tiered, interlocking fashion. The pallets were then placed aboard flatbed trucks by

forklift machines for transport to the port of Freeport, Texas. Each bag weighed 50 kilos (110 pounds). Each pallet contained thirty bags, stacked six to a row by five rows high.

7. Third-party Defendant Langston Companies, Inc., Continental Bag Division ("Langston") is a manufacturing business located in Crawley, Louisiana. Langston manufactured the polypropylene bags in question and sold them to Affiliated.

8. Third-party Defendant Cargill, Inc. ("Cargill") originally purchased the rice from Affiliated for resale to the government of Iraq. The Iraqi government routinely issues "rice tenders" for specified quantities of rice from American traders. These tenders specify that the rice is to be packaged in single 50-kilo polypropylene bags.

9. Cargill purchased the rice from Affiliated on an F.A.S. basis. Cargill specified that the rice be packaged in accordance with the Iraqi tenders.

10. Cargill subsequently sold the rice shipment to Third-party Defendant Euro Grain Trading, Ltd. ("Eurograin"), another rice trading company, in August, 1983. Eurograin thereafter chartered the M/V RAJAAN from Dianella. Eurograin owned the rice shipment at the time of Plaintiff's injury.

11. Third-party Defendant Brazos River Harbor Navigation District ("Brazos") is a governmental authority which provided the M/V RAJAAN with berthing, water and other necessities from September 19 through September 23 of 1983. Defendant Dianells agreed to abide by the rules and regulations promulgated by Brazos in its tariff.

12. The rice bags were palletized by Affiliated on wooden pallets provided to it by Brazos. Affiliated then shipped the rice by truck to warehouse facilities at the port of Freeport for storage pending overseas shipment. The warehouses were owned and operated by Brazos.

13. Third-party Defendant Trans Ocean America was dismissed from the case by this Court on October 5, 1984 for failure to state a claim against it. Third-party Defendant General Produce and Fibres, Inc. was similarly dismissed on January 25, 1985. Dianella orally moved to non-suit its claims against Third-party Defendants Amoco Fabrics Company and Synthetic Industries Texas, Inc. Accordingly, the claims against these Defendants will be dismissed by the Court.

14. Intervenor Texas Employers' Insurance Association was the insurance carrier for Plaintiff's employer at the time of Plaintiff's injury. Intervenor has paid (through the time of trial) at least $159,585.91 in compensation and medical benefits on Plaintiff's behalf.

15. The M/V RAJAAN commenced its voyage in Honduras and was en route to Aqaba, Jordan, with intermediate calls at Freeport, Texas and Pensacola, Florida to load rice cargo for delivery in Jordan. The vessel docked in Freeport on September 19, 1983 with its starboard side to the berth's dock.

16. The ship began loading palletized sacks of rice into various cargo holds, including the No. 2 hold, at about 1:00 p.m. on September 20, 1983, using the ship's winches.

17. The cargo winch on the starboard side of the forward end of the No. 2 hold began malfunctioning

near the outset of cargo loading operations. The winch would slow down or stop unexpectedly while palletized rice bags were being loaded onboard the vessel.

18. The cargo winches were rigged in a so-called "union purchase" arrangement, meaning that both the port and starboard winches at each hatch were attached to the palletized loads. Each load would be hoisted up from the dock and then moved horizontally to a position over the hatch. This manuever was accomplished by letting out (lowering) the starboard winch and raising (heaving) the port winch. The port winch would properly continue to heave when the starboard winch occasionally slowed or stopped, resulting in a jerking motion or swing of the pallet as it was being moved over the deck.

19. Two longshoremen operated the winches for the No. 2 hold, each one of them operating it for an hour at a time. In the middle of the afternoon on September 20, 1983, the operator notified his foreman that the No. 2 starboard winch was not working properly. The stevedore's walking foreman, who supervised the loading operation on board the vessel, in turn notified the ship's crew. The crew, supervised by the second engineer, added hydraulic fluid to the wayward winch by means of a hand pump. The ship's crew then announced that the winch had been repaired and that loading operations should resume.

20. The problems with the No. 2 starboard winch continued intermittently on September 21, 1983. Several complaints were lodged with the ship's crew by the walking foreman pertaining to these difficulties. The crew, on two occasions, again added hydraulic fluid by using

a hand pump on September 21, 1983. On each of these occasions, the ship's crew sent the longshoremen back to work after pronouncing the winch to be sound.

21. The second occasion for the adding of the fluids on September 21 occurred less than one hour before the incident which caused Plaintiff's injury.

22. At about 4:00 p.m. on September 21, 1983, the winch operator working the No. 2 hold was moving a pallet of bagged rice over the cargo hold. The starboard winch abruptly stopped, causing the pallet to jerk and begin swinging just as it passed over the edge of the hatch. The resultant force of this jerking motion dislodged at least one 110-pound rice bag from the pallet. The rice bag fell and struck Plaintiff on his upper back.

23. The Plaintiff was working as a longshoreman at the time of the injury, and had been employed as a longshoreman for the three years immediately preceding his injury.

24. The Plaintiff was rendered a permanent T-5 paraplegic by the rice bag, which landed on his upper back and fractured his spine. He is completely paralyzed from the level of the nipple area of his chest downward. The Plaintiff, now age thirty-two, is confined to a wheelchair for life. Moreover, he sustained injuries to the left and right brachial plexus, thereby suffering limited use of, and diminished sensation in, his arms. He has been recently diagnosed as having a spinal cyst, which may or may not cause further medical complications in the future. Plaintiff has lost both bladder and bowel control, and he can no longer enjoy sexual relations with his wife. His formal education is minimal, and the combination of his severe injuries with his low level of schooling and

training leaves him unemployable. Moreover, his limited intellectual skills make it difficult for him to compensate for the loss of his physical abilities.

25. There is some evidence that the operators were operating the winches in a rough manner when they began loading operations on September 20. This problem was apparently resolved, however, during the early afternoon of the 20th, after the operators' supervisor admonished them at the request of the ship's officers. Further, a member of the ship's crew stated that he observed the winch operators for the No. 2 hold during the day of the accident (the 21st) and that they were operating the winch in a proper manner. Based on the foregoing, and on the other evidence heard at trial, the Court finds that Plaintiff's injury was not caused by any negligence or fault on the part of the winch operators.

26. The Court finds that the Plaintiff's injury was caused by the malfunction of the starboard winch control discussed earlier. This malfunction was the same problem brought to the attention of the vessel's crew and officers on several prior occasions.

27. The crew and officers of the M/V RAJAAN, including the second engineer (who was primarily responsible for maintenance and repair of the ship's winches), had actual knowledge, prior to the incident which caused Plaintiff's injuries, that the winch was malfunctioning. Further, as noted above, the crew and officers not only had actual knowledge that the longshoremen would continue to load cargo and to use the malfunctioning winch, they told the longshoremen on three occasions that the winch had been repaired and that loading operations should resume.

28. Based on the foregoing, the Court finds that the ship's officers and crew breached the duty owed to the longshoremen to remedy the hazard. By failing to either fully and competently repair and maintain the winch or else take it out of service, the officers and crew negligently breached their duty, and such negligence caused the Plaintiff's injury.

29. Plaintiff was an experienced longshoreman. He knew, or reasonably should have known, that he should not have remained in the area of the open hatch square as palletized cargo was being moved over it. A warning shout was given by the winch operator as the load neared the hatch square, as was usually done, and Plaintiff failed to move quite as quickly in response to the warning as he reasonably should have. This failure is mitigated by the fact that he was still in the process of unloading the previous pallet when the warning came and by the fact that his path to safety was somewhat impeded by the presence of that pallet.

30. The winches onboard the vessel did not have any design, manufacturing or marketing defects. The winches were not unreasonably dangerous.

31. The remote control had no defects in marketing, design or manufacture. It was not unreasonably dangerous.

32. IHI and OJI provided adequate warnings and instructions to the vessel's crewmembers and the stevedore's employees concerning appropriate methods for maintaining the winches and remote control and for correcting such operational or mechanical problems as were reasonably foreseeable under the relevant circumstances.

33. The Court finds that neither IHI nor OJI committed any acts or omissions which constitute negligence. Further, no facts have been shown to establish liability for the design, manufacture, or marketing of defective or unreasonably dangerous products. Finally, neither OJI nor IHI breached either express or implied warranties of any sort.

34. Affiliated (the successor to West Texas Rice Company) palletized the rice bags using practices which are customary in the pertinent industry. Dianella contends that Affiliated was negligent, in that the bags were not secured to the pallet by means of slings, stretch-wrapping or shrink-wrapping. The Court does not concur with this contention. Approximately 98% of all rice cargoes are shipped within and from the United States in precisely the manner used by Affiliated. Further, the additional methods of pre-slinging and the like are not economically feasible or functionally practicable for the handling of such cargoes. The Court finds that Affiliated palletized the rice bags in a manner consistent with ordinary prudence. Affiliated's conduct was reasonable and non-negligent in light of the relevant circumstances.

35. Dianella contends that the polypropylene bags were defective or were negligently manufactured by Langston. The gist of this argument is that the bags were too slippery to be safe. The argument is without merit. There is no evidence that the bags failed to meet applicable governmental standards or failed to comply with the specifications of the party (or parties) responsible for ordering the bags. Dianella has shown no defect in the design, manufacture or marketing of the polypropylene sacks, nor is there sufficient evidence to support a finding of any negligence on the part of Langs-

ton. Langston breached no warranty, either express or implied.

36. The decision to use polypropylene bags for the cargo of rice was reasonable and non-negligent. Further, the decision comported with established industry practices. The Court can discern no facts upon which it could find that the Third-party Defendants Cargill, Eurograin, or Brazos either acted negligently or negligently failed to do some act required of them by any cognizable duty. Similarly, these Defendants breached no warranty of any sort, and they committed no acts upon which a theory of strict liability could be sustained.

37. The Court finds that Plaintiff's injuries were proximately caused by the concurrent negligence of Defendant Dianella and the Plaintiff. This negligence must be apportioned.

38. The Plaintiff's negligence essentially consists of a split-second of ill-timing. Another step or two toward the safety area of the cargo hold would have prevented the accident. When the rather slight magnitude of this factor is combined with the mitigating circumstances surrounding Plaintiff's negligence (discussed earlier), it is reasonable to find that the percentage of fault attributable to the Plaintiff is 5%. The remaining 95% must be assessed against Dianella. The Court therefore finds that Plaintiff was 5% at fault and that Defendant Dianella was 95% at fault.

39. The Court finds that Plaintiff is permanently and totally disabled, and he will not obtain gainful employment during the remainder of his natural life.

40. The Court finds that, in all reasonable probability, the Plaintiff will be permitted to continue re-

siding in the United States for an indefinite period; and, he will receive medical and attendant care here for the foreseeable future. He intends to reside here permanently.

41. We must determine the present value of Plaintiff's future economic losses by use of the below-market discount rate method. This method represents the real rate of after-tax dollars with adjustments for future inflation. The below-market discount rate is applied to the projected income stream of the Plaintiff. The income stream is based on a consideration of past wages, productivity, fringe benefits, and the reasonably anticipated wage increases which will result from all factors other than inflation. In the instant case, we begin by considering Plaintiff's past wages. Plaintiff was earning $14.00 per hour at the time of his injury. He was a "casual" worker on the docks, meaning that his employment was not as steady as those longshoremen who had more seniority than Plaintiff. As a result of this "casual" status, his gross income for the years preceding the incident causing his injury was somewhat less than might be expected for a worker making $14.00 per hour. Specifically, his income in 1980 was $8,341.00; in 1981, it was $8,634.00; and in 1982, it was $6,500.00. (The injuries occurred in 1983.)

42. If Plaintiff had not been injured, it is more likely than not that he would have continued working as a longshoreman. He would have gained seniority and thus would have enjoyed increased work-hours. Further, his increased experience would have resulted in increased job productivity.

43. Based on a consideration of the testimony of Dr. Everett Dillman, an economist, concerning the relevant

factors which should produce a reasonable below-market discount rate, the Court finds that the applicable discount rate lies between 1% and 1½%.

44. Dr. Dillman presented competent and reliable evidence on the wage increases Plaintiff would have received due to non-inflationary factors, including productivity. He compared wage increases in the general work force to yearly earnings on tax-free municipal securities for the years 1947 through 1983. Since inflation generally has an equal impact on wages and interest rates, this comparison shows the difference between non-inflationary wage increases and the below-market discount rate. Based on the foregoing analysis, Dr. Dillman concluded that the average increase in wages has been 0.85% higher than the average yields on tax-free municipal securities. Hence, subtracting inflation from both sides of the equation yields a non-inflationary wage increase which has been 0.85% higher than the "real" interest (i.e., non-inflationary market interest) which could have been earned on tax-free municipal securities.

45. The Court finds Dr. Dillman's historical and economic analysis concerning future wage increases and the application of the discount rate to be highly persuasive. The result of his analysis is that wages can be expected to increase in the future by a factor of 0.85% *more* than the below-market discount rate. Hence, the Court must discount future income losses by a factor of negative 0.85% to compute the present value of his lost future wages.

46. Plaintiff had a work-life expectancy through age 60. Using generally-accepted labor statistics for longshoremen, and applying the average annual wage in-

creases as adjusted by proper discount factors, the Court finds that the present value of Plaintiff's lost future wages is $800,221.00, including fringe benefits.

47. The next item of pecuniary losses suffered by Plaintiff concerns household services. The Plaintiff, in all likelihood, would have performed household services at an average of ten hours per week through age 72 (his life expectancy). Multiplying those hours by the federal minimum wage, and then adjusting the resultant figure by a discount rate of negative 0.85% yields a present value for those services of $87,471.00. Plaintiff will be unable to perform these services and therefore he should recover reasonable compensation for this loss. The Court finds that $87,471.00 constitutes a reasonable recovery for lost household services.

48. Plaintiff incurred reasonable and necessary medical expenses of $153,472.48 from the date of his injury through December 1984. (The case was tried in late January of 1985.) The Court finds that Plaintiff should recover that amount for his past medical expenses.

49. Based on the testimony of various medical personnel, including Plaintiff's treating physician, the Court finds that Plaintiff will incur $10,000.00 per year in future medical and hospital expenses (exclusive of attendant care and medical commodities) for the rest of his life. Discounting this amount to present value, and considering the impact of a 1.67% non-inflationary rate of annual increases for medical care, the Court finds that Plaintiff will incur $582,000.00 in future medical and hospital expenses.

50. The Court heard evidence concerning the extensive degree of attendant care Plaintiff will need in the

future. Based thereon, and assuming that Plaintiff's physical condition will not significantly deteriorate over the years, the Court finds that the cost of Plaintiff's necessary attendant care will be $12,547.60 per year. Using the same methodologies discussed above, the Court finds the present value of Plaintiff's attendant care to be $730,000.00.

51. Plaintiff will need a number of medical commodities throughout the remainder of his life, including prescription drugs, suppositories, catheters, lotions, plastic gloves, a wheelchair, a hospital bed, and related items. The Court finds the present value of these items to be $152,000.00.

52. A person suffering from paraplegia generally incurs utility bills which are as much as 20% above the normal consumption rate for healthy persons living in dwellings of similar size. This is so because there is a greater need to control a paraplegic's environment so as to minimize the risks of various medical illnesses which flow from placing a paraplegic in an uncontrolled environment. Further, due to bowel and bladder accidents (for example, catheters frequently loose their proper position when used by paraplegics), cleaning and laundering costs are higher than those found in the general population. In order to have any significant mobility outside the home, a paraplegic needs to use a modified van, a wheelchair lift, and other related equipment. The Court finds that the reasonable costs of the foregoing non-medical commodities, discounted to present value, to be $465,000.00.

53. The total amount of the Plaintiff's pecuniary losses, discussed in Findings 39 through 52, is $2,969,-

693.48. This amount will adequately compensate the Plaintiff for his pecuniary damages.

54. Plaintiff has suffered, and will continue to suffer, physical pain and enormous mental anguish. The Court has earlier noted the catastrophic nature of Plaintiff's injuries in Finding 24. After carefully considering the nature and effects of these injuries, and after having observed the Plaintiff at length in court, this Court has determined that Plaintiff's non-pecuniary losses (i.e., his pain and suffering) will be adequately compensated by the award of $1,000,000.00.

55. Plaintiff contends that the evidence would support the imposition of punitive damages. The Court does not agree. The crew and officers of the vessel had actual knowledge of the malfunction in the winch. They tried to repair it and failed to do so on several occasions. By failing either to competently repair the winch or else to take it out of service, they were certainly negligent. Further, they knew that the Stevedore relied upon their assurances that the winch was fixed and that loading operations should resume. It is not clear, however, that either the ship's engineer or the crew actually *knew* that their attempts to repair the winch would not solve the problem. Further, Plaintiff's contention that the crew merely "put on a show" when attempting to repair the winch is not supported by a preponderance of the credible evidence. The fact that, after the incident in question, the chief engineer may have prevented certain matters concerning the malfunctioning winch from being entered in the ship's log does not call for the imposition of punitive damages. While such behavior is reprehensible, it does not show reckless, wanton or egregious actions which

proximately caused Plaintiff's injuries. Moreover, Plaintiff has not established that the shipowner actually ratified or authorized the negligent conduct of his officers and crew. The evidence is simply insufficient to support an award of punitive damages, especially in light of the pertinent legal standards which will be discussed below.

56. The total amount of Plaintiff's damages is $3,969,693.48. When this is reduced by 5% (to account for Plaintiff's percentage of fault), the result is $3,771,208.80. The Court therefore finds that Plaintiff's recoverable damages amount to $3,771,208.80, together with an award of prejudgment interest.

CONCLUSIONS OF LAW

1. This is a Rule 9(h) maritime proceeding. The cause of action is based on 33 U.S.C. § 905(b). The Court has jurisdiction of the case pursuant to 28 U.S.C. § 1333.

2. Generally, a shipowner may rely on the stevedore to avoid exposing longshoremen to unreasonable hazards. 33 U.S.C. §§ 905(b) and 941; *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 170 (1981). The shipowner is not liable for injuries caused by dangers unknown to him and about which he had no duty to inform himself. *Scindia*, at 172. However, there are circumstances in which the shipowner does have a duty to act where the danger to longshoremen arises from some malfunctioning of the ship's gear which is being used in cargo operations. These circumstances include a situation where the shipowner should anticipate that the stevedore will not or cannot correct the danger. *Id.*, at 174-175.

3. A shipowner who has actual knowledge that a hazardous condition exists due to a malfunction in one of the ship's winches which arises during cargo-loading operations, and who has actual knowledge that the stevedore will continue to use the winch in its hazardous condition without remedying the situation, has a duty to the longshoremen to intervene and either repair the winch or take it out of service. *Webster v. M/V MOOLCHAND*, 730 F.2d 1035 (5th Cir. 1984). Even if both the stevedore and the shipowner are at fault in improperly dealing with such a situation, an injured longshoreman is entitled to recover the entire amount of his damages from the shipowner, limited only by the percentage of any negligence directly attributable to the longshoreman himself. *Id.*; *Lopez v. A/S D/S SVENDBORG*, 581 F.2d 319 (2d Cir. 1978).

4. If the vessel owner is found to be negligent, the question of whether the longshoremen-plaintiff was himself negligent must also be considered. *E.g.*, *Wiles v. Delta Steamship Lines, Inc.*, 574 F.2d 1338, 1339 and cases cited therein (5th Cir. 1978). If the plaintiff was also negligent, the admiralty rules of comparative negligence apply. *Id.*

5. When the facts of the case are applied to these authorities, it is clear that Plaintiff may recover the full amount of his damages from Defendant Dianella, limited only by the percentage of fault attributable to his own negligence.

6. The Plaintiff's pecuniary damages, as found by the Court, comport with the requirements enunciated in *Culver v. Slater Boat Co. (II)*, 722 F.2d 114 (5th Cir. 1983) (*en banc*) concerning the computation of dam-

ages for future pecuniary losses discounted to present value by means of the below-market discount rate method.

7. The award of $1,000,000.00 for pain and suffering is based on this Court's observation of the Plaintiff and our subjective determination of the amount needed to achieve full compensation, taking into account both the severity of his injuries and the finding that the award of pecuniary damages will adequately and reasonably compensate Plaintiff for his medical needs and lost future earning capacity. *See Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028, 1035 (5th Cir. 1984).

8. Defendant Dianella argues that punitive damages may not be awarded under Section 905(b) of the Longshoremen's Act. There is authority to support this argument. First, the statutory language of Sec. 905(b) provides the "exclusive" remedy for injured longshoremen by allowing recovery "in the event of injury . . . caused by the *negligence* of the vessel (emphasis added)." A strict construction of this language would arguably foreclose the assertion of a recovery for gross negligence. Second, at least two courts have held that an action by a longshoreman against his employer under Sec. 905(a) for gross negligence cannot lie. *Houston v. Bechtel Associates*, 522 F.Supp. 1094 (D.D.C. 1981); *Garibay v. Decker*, 331 F.Supp. 1093 (S.D. Tex. 1971). On the other hand, the statutory language quoted above is not, in and of itself, dispositive of the issue, and the jurisprudential reasons for denying a cause of action for gross negligence against an *employer* do not necessarily control the issue of whether such a cause of action could lie against a *shipowner*. We have found no cases squarely on point. The question is apparently an unsettled one.

9. We need not decide whether a claim for gross negligence will lie against a shipowner under Sec. 905 (b). This is so because, in any event, the Plaintiff has failed to show evidence which would satisfy established principles of maritime law for the imposition of punitive damages. For example, in *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981), the Court noted that punitive damages are available under general maritime law where the facts show willful and wanton misconduct by the shipowner himself in the creation or maintenance of unseaworthy conditions. Similarly, an award of punitive damages for failure to pay maintenance and cure must be grounded on some egergious conduct of the shipowner exhibiting wanton and intentional disregard of a seaman's rights. *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 88 (5th Cir. 1984). At least one court has held that "the better rule" is that punitive damages are not recoverable against a shipowner for the acts of his vessel's master unless it can be shown that the owner ratified or authorized the acts of the master. *United States Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1959), *cert. denied*, 398 U.S. 958 (1970). When the standards of either *Merry Shipping*, *Harper*, or *Fuhrman* are applied to the facts of this case, it is apparent that the Plaintiff has not established a right to recover punitive damages, assuming *arguendo* that he may even make such a claim under Sec. 905(b).

10. The allowance of prejudgment interest lies within the discretion of the admiralty trial judge. Its allowance in maritime cases is the rule, rather than the exception. *Webster, supra*, at 1040-1041 and cases cited therein. The Court therefore exercises its discretion to award Plaintiff prejudgment interest at the rate of 9% *per*

annum from September 21, 1983 (the date of the injury) to the date judgment is entered herein.

11. The Court concludes that Plaintiff is entitled to judgment against the M/V RAJAAN, *in rem*,[1] and Defendant Dianella Shipping Corporation in the amount of $3,771,208.80, together with post-judgment interest at the rate of 9% *per annum*.

12. The Court concludes that Dianella is not entitled to any recovery from any of the Third-party Defendants. Third-party Defendants Amoco Fabrics Company and Synthetic Industries Texas, Inc. are hereby dismissed from the lawsuit. Judgment on the merits will be entered for the remaining Third-party Defendants.

13. Intervenor Texas Employers' Insurance Associated is subrogated to the rights of the Plaintiff, and is entitled to recover the first $159,585.91 of any recovery made by Plaintiff, plus any amounts subsequently paid by the Intervenor to Plaintiff for compensation and medical benefits.

14. Finally, Defendant Dianella has raised the question of whether it is entitled to limit its liability to the value of the vessel plus pending freight, pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. § 181 *et seq*. Dianella has submitted an affidavit to the effect that the value of the vessel is approximately $2,400,000.00. No evidence has yet been tendered on the value of pending freight. (Dianella seeks a separate proceeding on the Limitation issue.) While the Court has

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1. A return of the writ of seizure issued for the vessel was made herein on September 30, 1983. The Court therefore has *in rem* jurisdiction over the ship.

not determined whether Dianella is even entitled to claim the benefit of the Limitation Act, a substantial question has been presented which may well affect the validity of any judgment herein exceeding $2,400,000.00. The issue must be determined by a post-judgment hearing and ruling thereon. The Court, therefore, deems it necessary to stay enforcement of a portion of the judgment, pursuant to Rule 62(b), F. R. Civ. P.

A Final Judgment will be entered in accordance herewith.

DONE in Houston, Texas, this _____ day of August, 1985.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

APPENDIX B

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Etc., and Dianella Shipping Corporation,
Defendants-Third Party Plaintiff-Appellants,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES,
LTD., Cargill, Inc., et al.,
Third Party Defendants-Appellees.

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Her Engines, Tackle, etc., in rem,
and Dianella Shipping Corporation,
Defendants-Appellants.

Nos. 85-2608, 87-2044.

United States Court of Appeals,
Fifth Circuit.

March 30, 1988.

Injured longshoreman brought action against shipowner and vessel to recover damages for personal injuries caused by falling sack of rice. Shipowner and vessel impleaded third-party defendants, who settled with longshoreman. The United States District Court for the Southern District of Texas, James DeAnda, J., found shipowner and vessel liable. Shipowner appealed. The Court of Appeals, Clark, Chief Judge, held that: (1)

shipowner was liable to longshoreman for damages caused by malfunctioning winch and falling bag of rice; (2) part-time longshoreman was not entitled to recover lost wages on basis of average wage rate, compensation for lost future benefits and seniority, compensation for lost ability to perform household services, and $446,400 for transportation expenses but was entitled to $1 million for pain and suffering; and (3) illegal alien longshoreman was entitled to damage award based on United States wage and medical rate.

Affirmed in part, vacated, and remanded.

Edward J. Hennessy, Helm, Pletcher, Hogan, Bowan & Saunders, Earl B. Austin, Baker & Botts, Houston, Tex., for Cargill, Inc.

David G. Matthiesen, Funderburk & Funderburk, Houston, Tex., for Langston Companies, Inc.

Stephen W. Hanks, Timothy H. Pletcher, Houston, Tex., for Hernandez.

Louis E. McCarter, Richard L. Lagarde, Houston, Tex., for Ishikawajima Harima Heavy Industries, Ltd.

Butler & Binion, Walker Beavers, Robert D. Arredondo, Houston, Tex., for Brazos River Harbor Navigation Dist.

Gray H. Miller, Fulbright & Jaworski, Houston, Tex., for Texas Employers' Ins. Ass'n.

John P. Forney, Jr., Houston, Tex., for Ohji Seiki-Kogyo Kabushiki.

Robert L. Adams, Houston, Tex., for Synthetic Industries, Inc.

Robert MacIntyre, Jr., Houston, Tex., for Euro Grain Trading, Ltd.

Edward J. Hennessy, Randall D. Wilkins, Houston, Tex., for Affiliated Rice Mills.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, BRIGHT* and POLITZ, Circuit Judges.

CLARK, Chief Judge:

The district court held a vessel owner liable to a longshoreman injured while loading palletized bags of rice into the vessel's cargo hold. We affirm that court's judgment of liability and portions of the damages awarded. We also affirm the rejection of the vessel owner's limitation of liability defense. We vacate, reverse or modify certain portions of the damages award we find to be erroneous.

On September 21, 1983, Alejandro Hernandez was partially paralyzed while working as a longshoreman aboard the M/V RAJAAN, a vessel owned by the Dianella Shipping Corp. The RAJAAN had docked in Freeport, Texas en route to Jordan to take on a cargo of rice. Hernandez, a thirty-two year old Mexican citizen, was helping to unload pallets of rice in the cargo hold of the RAJAAN. One of the hydraulic winches used to lower the pallets of rice malfunctioned and a 110-pound sack of rice fell onto Hernandez. As a result, he was permanently paralyzed from the chest down and retained only limited use of his arms.

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* Circuit Judge of the Eighth Circuit, sitting by designation.

Hernandez filed suit against Dianella, in personam, and against the M/V RAJAAN in rem. Dianella and the RAJAAN impleaded several third-party defendants.[1]

Hernandez settled with the third-party defendants for $410,000.00 before trial with the agreement that the settling defendants would be reimbursed if Hernandez's recovery exceeded $3,000,000.00. The Texas Employer's Insurance Association intervened and recovered $159,585.91 in compensation and medical benefits paid to Hernandez.

The district court sitting without a jury found Dianella and the M/V RAJAAN liable under 33 U.S.C. § 905(b) (1986). It awarded Hernandez pecuniary and non-pecuniary damages in the following amounts:

Lost future wages	$ 800,221.00
Lost household services	$ 87,000.00
Past medical expenses	$ 153,472.48
Future medical expenses	$ 582,000.00
Attendant care	$ 730,000.00
Future medical supplies	$ 152,000.00
Transportation and non-medical commodities	$ 465,000.00
Pain and suffering	$1,000,000.00
	$3,969,693.48

1. These defendants were Ishikawajima-Harima Heavy Industries, Ltd. (the manufacturer of the winch); O.J.I. Seiki-Kogyo Kabshiki Kaisha (the manufacturer of the winch's remote control system); Affiliated Rice Mills (a successor in interest to the company which milled and bagged the rice); Langston Companies, Inc., Continental Bag Division (the manufacturer of the polypropylene bags which held the rice); Cargill, Inc. (which purchased the rice for resale to the government of Iraq); Euro Grain Trading, Ltd. (which bought the rice from Cargill and chartered the RAJAAN); and Brazos River Harbor Navigation District (which provided the RAJAAN with berthing, water and other necessities). The court dismissed for failure to state a claim other third-party defendants impleaded by Dianella.

The court found Hernandez 5% negligent and reduced the recovery to $3,771,208.80. The court held a separate proceeding after trial on Dianella's petition to limit liability to the value of the vessel and pending freight under 46 U.S.C. § 183(a) (1975). The court rejected the petition on grounds that Dianella had not met its burden of proving that it lacked privity or knowledge of the negligent conditions which caused Hernandez's injuries.

Dianella appeals the finding of negligence and disputes the calculation of damages. We affirm the district court's findings on liability however find several portions of the damage award to be in error.

A) *Liability*

The legal duty of a shipowner to an injured worker arises from 33 U.S.C. § 905(b) (1986). It provides:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title . . ."

[1, 2] The Supreme Court clarified the duties imposed on shipowners and stevedores by § 905(b) in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1 (1981). The Court held that under § 905(b):

> "a shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within

> the confines of the cargo operations that are assigned to the stevedore."

Scindia, 101 S. Ct. at 1624. The shipowner is entitled to rely on the stevedore and in general owes no duty to a longshoreman injured in the course of cargo operations. *Morris v. Compagnie Maritime des Chargeurs Reunis, S.A.*, 832 F.2d 67, 71 (5th Cir. 1987). However, *Scindia* provides that if the shipowner had actual knowledge of a condition which presented an unreasonable danger to a longshoreman and actual knowledge that he could not rely on the stevedore to correct the condition, then the shipowner, not the stevedore, is liable to the longshoreman. *Scindia*, 101 S. Ct. at 1626. In *Helaire v. Mobil Oil Co.*, 709 F.2d 1031 (5th Cir. 1983) this Circuit held that:

> "[o]nce loading operations have begun, the vessel owner can be held liable for injuries to employees of the stevedore resulting from open and obvious dangers only in the event of actual knowledge of the danger *and* actual knowledge that he cannot rely on the stevedore to remedy the situation."

Helaire, 709 F.2d at 1038-39. If the condition existed from the outset, the shipowner is charged with actual knowledge of the dangerous condition and has a duty to warn the stevedore and the longshoremen if the defect is hidden. *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 (5th Cir. 1984).

[3] The district court charged Dianella with actual knowledge of an unreasonably dangerous condition based on its finding that the winch had been malfunctioning since the outset of loading. The court relied on testimony

that entries in the ship's log several days before the accident indicated that there was a "leaky winch" in the number one masthouse. No entry on the log indicates that a permanent repair was made. The vessel's second engineer testified that two days prior to the accident, the crew had pumped hydraulic fluid into the winch to purge air from the hydraulic system. The air pressure indicated that the system was leaking.

Next the court held that Dianella had actual knowledge that it could not rely on the stevedore to fix the winch. The stevedore testified that from the outset of loading, the winch would slow down or stop unexpectedly causing pallets holding sacks of rice to swing precariously above the cargo hold. On the day of the accident, each time the winch malfunctioned the stevedore notified the ship's crew. The crew halted loading and added hydraulic fluid to the winch. The stevedore would then resume loading. From this the district court concluded that Dianella had actual knowledge that the stevedore would continue to use the winch in its hazardous condition without remedying it and that the ship had a duty to intervene and repair the winch or take it out of service.

We uphold the district court's finding that Dianella was liable under § 905(b). Dianella argues that the stevedore is liable because he did not stop loading and inform Dianella when the winch malfunctioned immediately before Hernandez's accident. However, the record is replete with evidence that the winch had malfunctioned on many occasions prior to the day of injury, had malfunctioned several times on the day of the accident and that the additions of hydraulic fluid by Dianella were clearly not preventing or correcting the malfunctions. From this the district court fairly charged Dianella with

actual knowledge of the malfunctioning winch and with knowledge that the stevedore, who had been relying on Dianella to repair the winch, could not be expected to remedy the danger.

B) *Damages*

Dianella contends that several components of the damage award are excessive. The standards under which we review a damage award for excessiveness are well known. A trial judge's assessment of damages is a finding of fact which we review under the clearly erroneous standard. *Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028, 1035 (5th Cir. 1984), (*citing, Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 783 (5th Cir. 1983)). This court will not overturn a damage award unless the trier of fact abused its discretion. *Bartholomew v. CNG Producing Co.*, 832 F.2d 326, 331 (5th Cir. 1987) (*citing, Hawkes v. Ayers*, 537 F.2d 836, 837 (5th Cir. 1976)). A verdict will be considered excessive only if it is greater than the maximum amount the trier of fact could properly have awarded. *Sosa, supra*, at 1035. An appellate court may not determine excessiveness by comparing verdicts in similar cases, but rather must review each case on its own facts. *Winbourne v. Eastern Airlines, Inc.*, 758 F.2d 1016, 1018 (5th Cir. 1984), *cert. denied*, 474 U.S. 1036, 106 S. Ct. 603, 88 L.Ed.2d 582 (1985); *Sosa, supra*, at 1035.

Having determined that an award is excessive, this court may either order a new trial on damages or may give the plaintiff the option of avoiding a new trial by agreeing to a remittitur of the excessive portion of the award. *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 919 (5th Cir. 1987) (*citing, De Centeno v. Gulf*

Fleet Crews, Inc., 798 F.2d 138, 142 (5th Cir. 1986)); *Wells v. Dallas Independent School District*, 793 F.2d 679, 683-84 (5th Cir. 1986). This Circuit follows the maximum recovery rule under which a remittitur may reduce damages only to the maximum amount a trier of fact could properly have awarded. *Osburn, supra*, at 919 (*citing, Zeno v. Great Atlantic & Pacific Tea Co.*, 803 F.2d 178, 181 (5th Cir. 1986)); *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784 (5th Cir. 1983). Under these criteria, we review each component of the damage award.

i) *Lost Wages*

The trial court calculated the present value of Hernandez's lost future wages using the below-market discount rate. In arriving at the sum of $800,221.00, the court relied exclusively on the calculations of Hernandez's expert. The expert assumed a work-life expectancy of 30 years and used the average full-time United States longshoreman's rate of $23,000.00 per annum. The court adjusted this figure upward to account for seniority and added an additional 15% for fringe benefits. The court adjusted the figures downward to account for inflation, subtracted federal income taxes and multiplied by .85 to arrive at the present value of lost future wages.[2]

The record does not support these findings. Hernnadez's tax returns show that he had been a part-time longshoreman for the three years preceding his injury. His wage rate was $14.00 per hour. In 1980 he earned $8,341.00, in 1981 he earned $8,634.00, in 1982 he earned $6,500.-00 and in 1983 (prior to the accident) he earned $2,600.

2. The trial court failed to subtract $56,000 for social security taxes. Hernandez concedes a remittitur in this amount would be due.

No evidence supports the court's conclusion that Hernandez, a part-time worker, would have gained any seniority had he been able to remain on the job. There is no evidence that Hernandez had ever received any fringe benefits.

In *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983) (en banc), *cert. denied sub nom., Heinrich Schmidt Reederei v. Byrd*, 467 U.S. 1252, 104 S. Ct. 3537, 82 L.Ed.2d 842 (1984) (*Culver II*) the Circuit en banc stated that:

> "calculation of the lost income stream begins with the gross earnings of the injured party at the time of the injury. To this amount other income incidental to work, such as fringe benefits, should be added. From it, the fact-finder should subtract amounts the wage earner would have been required to pay such as income tax and work expenses."

Culver II, 722 F.2d at 117.

[4] Based on *Culver II*, the trial court was clearly erroneous in accepting a damage calculation based on the average longshoreman's wage rate. *Culver II* requires the court to use the plaintiff's gross earnings at the time of the injury. The court further erred by adding fringe benefits and seniority in the absence of evidence that Hernandez was entitled to these benefits while he was working part time.

[5] Dianella presented a computation using the below-market discount rate method but substituting Hernandez's actual earnings in the 3.82 years preceding the accident without seniority and fringe benefits. Under these calculations, Hernandez's lost wages would amount to $190,-

296.00.[3] Hernandez has not had the opportunity to challenge the accuracy of Dianella's calculations. We therefore hold that on the issue of lost wages Hernandez may either agree to a remittitur in the amount of $689,925.00, or he may opt for a new trial under the dictates of *Culver II* and this opinion.

ii) *U.S. v. Mexican Rates*

[6] In calculating lost wages and medical expenses, the district court assumed that Hernandez could continue working as a United States longshoreman despite evidence that he was an illegal alien who had been deported on several previous occasions and whose wife and three children resided in Mexico. The court based its assumption on its finding that Hernandez intended to reside permanently in the United States.

The court's assumption that an illegal alien may collect lost wages and medical expenses based on United States rates is called into question by *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S. Ct. 2803, 81 L.Ed.2d 732 (1984). In *Sure-Tan*, the Supreme Court remanded an award of a six-month back pay to several illegal aliens stating that:

> "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."

Sure-Tan, 104 S. Ct. at 2814. By similar logic, Dianella argues that Hernandez should be deemed ineligible to

4. Because social security taxes have been subtracted from Dianella's calculation of lost wages, it is not necessary to deduct from this sum the amount of $56,000.00 which Hernandez conceded was in error.

recover lost future United States wages and United States medical expenses because he was not entitled to be present and employed in the United States for the remainder of his life.

Although Dianella's argument may have been correct at the time of Hernandez's injury, the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101 *et seq.* (1987), has placed a belated stamp of legitimacy on the district court's assumption that Hernandez could remain in the United States. Section 1255a(a)(2)(A) of the Act provides that any alien who:

> "establish[es] that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date . . ."

and who meets the other requirements of the Act may be considered an alien lawfully admitted for temporary residence. The record indicates that Hernandez has resided in the United States continuously since 1970 and is therefore likely eligible for resident alien status. We need not ponder the effect of applying *Sure-Tan's* "legal readmittance into the United States" language to the court's award of lost wages and medical expenses to Hernandez. An illegal alien who has demonstrated his eligibility for permanent resident status under the Immigration Reform and Control Act is entitled to a damage award based on United States wage and medical rates.

iii) *Household Services*

[7] The district court awarded $87,000.00 for lost household services. The court calculated that Hernandez would have performed 10 hours of household services

a week for the remainder of his 72 year life expectancy. However, there was no evidence that Hernandez had performed any household services prior to his injury. Hernandez testified that he lived alone in an apartment at the time of his injury and performed no yard or automobile work. His wife and three children lived in Mexico and his services could not have contributed to their household.

It is indisputable that Hernandez, a paraplegic, has lost his ability to perform household services in the future. However, the trial court is not at liberty to grant damages for lost household services in the absence of *any* evidence that Hernandez performed household services in the past. *See e.g., De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 142 (5th Cir. 1986). In addition, because Hernandez received an award for attendant care, the additional recovery for lost household services would constitute a double recovery. The erroneous allowance of $87,000.00 for lost ability to perform household services is reversed.

iv) *Medical Expenses*

The trial court awarded $153,472.48 in past medical expenses, $152,000.00 for future medical supplies and $582,000.00 in future medical and hospital expenses exclusive of attendant care. Hernandez's expert arrived at these figures by estimating what medical expenses Hernandez had incurred to date as a paraplegic and what expenses he could be expected to incur given his permanent disability.

[8] Dianella challenges the expert's calculation of future medical and hospital expenses on the basis that

he used tax exempt rather than taxable bonds. Dianella contends that the proper figure should have been $451,000.00. However, Dianella presents no legal authority suggesting that the expert's choice of tax exempt bonds was improper. Both types of investment were available and either properly could be used in the calculation. *See, e.g., Culver II, supra,* 722 F.2d at 122. This part of the award is supported by substantial evidence.

[9] Dianella further contends that the court should have calculated medical expenses using Mexican rather than United States rates. Dianella cites *Sosa v. M/V LAGO IZABAL,* 736 F.2d 1028, 1034 (5th Cir. 1984) in which we upheld the use of American medical rate in calculating medical expenses for a Mexican national only after a finding that "[the plaintiff] would not receive adequate medical care in Mexico." *Sosa,* 736 F.2d at 1034. Dianella contends that because the court made no such finding in Hernandez's case, it cannot calculate future medical expenses using American rates. However, *Sosa* does not state that a finding of inadequate foreign medical care must precede every award of medical expenses based on American rates. The decision of which rate to use is a finding of fact which varies from case to case. In this case, Hernandez has been under the care of doctors in Houston and, as discussed in § ii, *supra,* is probably entitled to remain in the United States for his medical care. The court's award of medical expenses based on American rates is therefore not clearly erroneous.

v) *Transportation and Non-Medical Commodities:*

[10, 11] The court awarded $446,400.00 for transportation expense and $18,600.00 for non-medical commodities such as utility bills, cleaning and laundering.

Substantial evidence supports the district court's finding that paraplegics do incur higher utility bills and laundering expenses than non-paraplegics. However, substantial evidence does not support the court's award for transportation expenses. Hernandez testified that he never owned a vehicle before the accident and that since the accident, he only leaves his house to visit friends at a local social hall. He makes this 20-block trip in his wheelchair for exercise. No evidence was presented that Hernandez needed a modified van for medical reasons. This testimony does not support the court's finding that Hernandez required the continuous use of a fully new van plus modifications and operating expenses totaling $446,400.00.

Dianella's expert testified that a large, two-door sedan provided customary transportation for paraplegics at a cost, including upkeep, of $24,248.00. In light of Hernandez's testimony concerning his infrequent use of transportation, this is the largest award supportable by the evidence. Hernandez may accept a remittitur in the amount of $422,151.00 or choose a new trial on the issue of transportation expenses limited to meeting proven needs on a basis of using or renting vehicles of reasonable cost.

vi) *Attendant Care*

[12] The court found that Hernandez would incur $12,547.00 per year in attedant care expenses, at a present value of $730,000.00. The court based its conclusions on Hernandez's expert's testimony that Hernandez would require four hours of assistance by a nurse's aide daily. In the alternative, Hernandez's wife could be compensated on the basis of a nurse's aide's salary for

her assistance in "bathing, housekeeping and meal preparation."

Dianella contends that at most Hernandez requires one or two hours of attendant care daily. In fact, Dianella states that Hernandez would have difficulty being available for four hours of care each day in light of his active rehabilitation schedule. Dianella further states that Hernandez's wife should be compensated on a minimum wage scale, not at the salary of a nurse's aide. Dianella assumes that Hernandez's wife will be available to provide attendant care and that her care will be comparable to that care provided by a nurse's aide. Under its calculations, the maximum amount recoverable for attendant care is $141,534.50.

The evidence supports the district court's rejection of Dianella's assumptions. Hernandez will require skilled attendant care for the rest of his life. The record does not establish that his wife will continue to provide it or will provide it as competently as a nurse's aide. The trial court's award for attendant care is affirmed.

vii) *Pain and Suffering*

[13] The trial court awarded $1,000,000.000 for pain and suffering. Dianella disputes this finding on the basis that Hernandez was instantly paralyzed from the waist down and could not have felt any substantial pain as a result of the injury. Dianella contends that mental anguish does not justify the award in light of testimony by Hernandez's treating physician that he had adjusted well to the disability.

In *Hyde v. Chevron U.S.A., Inc.*, 697 F.2d 614, 632 (5th Cir. 1983), we stated that:

> "any amount awarded for pain and suffering depends to a great extent on the trial court's observation of the plaintiff and its subjective determination of the amount needed to achieve full compensation."

Hyde, 697 F.2d at 632. Each award for pain and suffering depends heavily on its own facts. *Allen v. Seacoast Products*, 623 F.2d 355, 364 (5th Cir. 1980).

The trial court based its award for pain and suffering on testimony that Hernandez suffered "phantom pains" in his legs, underwent several painful surgical procedures and would probably require more surgery in the future. He has experienced a catastrophic change in his lifestyle which has caused a significant degree of mental anguish. In light of this testimony, $1,000,000.00 is not a clearly excessive award beyond the "maximum possible recovery for these injuries." *Sosa, supra*, 736 F.2d at 1035. This award is affirmed.

viii) *Pre and Post Judgment Interest:*

The district court awarded prejudgment interest on the full damage award at a rate of 9% per annum accruing from the date of the injury to the date of the judgment. The court awarded postjudgment interest at a rate of 8.18% per annum.

[14] The award of prejudgment interest in admiralty cases is within the discretion of the trial court. *Curry v. Fluor Drilling Services, Inc.*, 715 F.2d 893, 896 (5th Cir. 1983) (*citing, Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 988 (5th Cir. 1978)). In cases arising under 33 U.S.C. § 905(b), prejudgment interest is the rule, not the exception. *Webster v. M/V MOOLCHAND, Sethia Liners Ltd.*, 730 F.2d 1035,

1040 (5th Cir. 1984) (*citing, Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1042 (5th Cir. 1983)).

[15] However, the trial court erred in awarding prejudgment interest with respect to future damages. *Martin v. Walk, Haydel & Associates, Inc.*, 794 F.2d 209, 212 (5th Cir. 1986); *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 956 n. 4 (5th Cir. 1984). At oral argument Hernandez conceded that a remittitur of prejudgment interest on future damages was due. We affirm the award of prejudgment interest on past damages and the award of post-judgment interest, but direct the district court to recalculate the amount of interest awarded on future damages and vacate its prejudgment interest award.

ix) *Credit for Settlement:*

[16] The third-party defendants settled with Hernandez before trial for $410,000.00 and then participated in the trial to establish Dianella's negligence. Dianella concedes that under *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1251 (5th Cir. 1979) it is not automatically entitled to a credit for the settlement. It argues, however, that the amount of the settlement must be deducted from the total damages awarded for Hernandez's injury. Dianella's arguments have merit.

In a recent decision, the Eleventh Circuit held that a plaintiff in a maritime suit is entitled to receive a full damage award less any amount he recovered in a settlement with third-party defendants. *Self v. Great Lakes Dredge & Dry Dock Company*, 832 F.2d 1540, 1548 (11th Cir. 1987). We find the Eleventh Circuit's reasoning in *Self* sound. Hernandez is only entitled to one recovery for the injuries he suffered. *Strachan Shipping*

Co. v. Nash, 782 F.2d 513, 520 (5th Cir. 1986). Because the court's award against Dianella represented 100% of the loss Hernandez suffered (less 5% for contributory negligence) his award from Dianella must be reduced by any amount he received in a settlement from the third-party defendants.

C) *Limitation of Liability*

At a separate hearing after the verdict was rendered, the district court denied Dianella's petition to limit its liability to the value of the vessel plus pending freight, pursuant to 46 U.S.C. § 183(a) (1958).[4] Section 183(a) provides that:

> "The liability of the owner of any vessel . . . for any loss, damage, or injury . . . done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not, except in cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

[17-19] "Privity" as used in the statute means some fault or neglect in which the shipowner personally participates. "Knowledge" means personal cognizance or means of knowledge of which the shipowner is bound to avail himself. *Matter of Texaco, Inc.*, 570 F.Supp. 1272, 1278 (E.D. La. 1983). The burden of establishing 'lack of privity or knowledge' is on the shipowner. *Farrell Lines, Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir.

4. The value of the vessel plus pending freight was $2,820,917.39. We recognize that the adjustments in damages awarded could render this issue moot. However, since the case must go back for further consideration by the district court, it is in the interest of justice to rule on the issue now in the event it recurs.

1976). The court denied the defense holding that Dianella did not meet its burden of establishing lack of privity or knowledge about the malfunctioning winch.

[20] Dianella's managing agent and port engineer testified that they did not have privity or knowledge of negligent acts or unseaworthy conditions. However, this testimony does not establish that the RAJAAN's owner lacked privity or knowledge of the unseaworthy conditions nor does it establish who exercised control over the RAJAAN. In light of this failure of proof by Dianella and the fact that proof of privity or knowledge of the RAJAAN's owners was solely within Dianella's control, we affirm the findings of the district court.

The costs of this appeal will be equally divided between the parties.

AFFIRMED in part, subject to possible remittitur, and, in part, VACATED and REMANDED.

APPENDIX C

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, etc., and Dianella Shipping Corporation,
Defendants-Third Party Plaintiff-Appellants,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES, LTD., Cargill, Inc., et al.,
Third-Party Defendants-Appellees.

Alejandro HERNANDEZ,
Plaintiff-Appellee,

v.

M/V RAJAAN, Her Engines, Tackle, etc., in rem, and Dianella Shipping Corporation,
Defendants-Appellants.

Nos. 85-2608, 87-2044.

United States Court of Appeals,
Fifth Circuit.

June 20, 1988.

Longshoreman brought action against shipowner and vessel to recover for personal injuries caused by falling sack of rice. The United States District Court for the Southern District of Texas, James DeAnda, J., found shipowner and vessel liable, and shipowner appealed. The Court of Appeals, 841 F.2d 582, affirmed in part, vacat-

ed, and remanded. On petition for rehearing and suggestion for rehearing en banc, the Court of Appeals held that longshoreman, an illegal alien who had been deported on several previous occasions and whose family resided in Mexico, was entitled to damages for future lost wages at United States rates after he was injured while loading vessel, absent showing by vessel owner that longshoreman was about to be deported.

Petition denied.

Kenneth D. Kuykendall, Royston, Rayzor, Vickery & Williams, Houston, Tex., Robert DeLange, Galveston, Tex., for Dianella, etc., and M/V Rajaan, etc.

Edward J. Hennessy, Helm, Pletcher, Hogan, Bowan & Saunders, Earl B. Austin, Baker & Botts, Houston, Tex., for Cargill, Inc.

David G. Matthiesen, Funderburk & Funderburk, Houston, Tex., for Langston Companies, Inc., et al.

Stephen W. Hanks, Timothy H. Pletcher, Houston, Tex., for Alejandro Hernandez.

Louis E. McCarter, Richard L. Lagarde, Houston, Tex., for Ishikawajima Harima Heavy Industries.

Butler & Binion, Walker Beavers, Robert D. Arredondo, Houston, Tex., for Brazos River Harbor Navigation Dist.

Gary H. Miller, Fulbright & Jaworski, Houston, Tex., for Texas Employers' Ins. Ass'n.

John P. Forney, Jr., Houston, Tex., for Ohji Seiki-Kogyo Kabushiki Kaishi.

Robert L. Adams, Houston, Tex., for Synthetic Industries, Inc.

Robert S. MacIntyre, Jr., Houston, Tex., for Euro Grain Trading, Ltd.

Edward J. Hennessy, Randall D. Wilkins, Houston, Tex., for Affiliated Rice Mills.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, BRIGHT* and POLITZ, Circuit Judges.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 30, 1988, 5 Cir. 1988, 841 F.2d 582)

PER CURIAM:

In its petition for rehearing, Dianella correctly points out that the legal and factual issues involved in our determination that Hernandez had demonstrated eligibility for permanent resident status under the Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101 *et seq.* (1987), were not properly briefed or developed in either this court or the district court. Part B(ii) of this court's opinion of March 30, 1988, 841 F.2d 582, which concluded that Hernandez had demonstrated his eligibility for permanent resident status under the Immigration Reform and Control Act, was improper, and that part of our opinion is hereby withdrawn and the following is substituted:

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* Circuit Judge of the Eighth Circuit, sitting by designation.

ii) *U. S. or Mexican Rates*

In calculating lost wages and medical expenses, the district court assumed that Hernandez could continue working as a United States longshoreman despite evidence that he was an illegal alien who had been deported on several previous occasions and whose wife and three children resided in Mexico. The court based its assumption on its finding that Hernandez intended to reside permanently in the United States.

The court's assumption that an illegal alien may collect lost wages and medical expenses based on United States rates is challenged by Dianella on the basis of *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 104 S. Ct. 2803, 81 L.Ed.2d 732 (1984). In *Sure-Tan*, the Supreme Court remanded an award of back pay to several illegal aliens, stating that:

> "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."

Sure-Tan, 104 S. Ct. at 2814. Dianella argues that Hernandez similarly should be deemed ineligible to recover lost future United States wages and United States medical expenses because he was not entitled to be present and employed in the United States for the remainder of his life.

Hernandez asserts that he was working in the United States at the time of his injury, and the district court found that he intended to continue working in this country on a permanent basis. The record demonstrates that

Hernandez had been in the United States since 1970 for substantial periods of time and had worked as a longshoreman for almost four years preceding the accident. At the time of the accident, Dianella was accepting Hernandez's labors on the M/V RAJAAN without regard to the status of his citizenship. As a private citizen, Dianella's relationship to Hernandez is not the same as the plaintiffs' relationship with their employer in *Sure-Tan*, in which a back-pay remedy applied by the National Labor Relations Board was found to implicate labor policy considerations.

The question here is whether, given Hernandez's status as an illegal alien, the district court's decision to grant damages to Hernandez for future lost wages based upon his employment status at the time of injury and for the lengthy period preceding injury was clearly erroneous. *Sosa v. M/V LAGO IZABAL*, 736 F.2d 1028, 1035 (5th Cir. 1984). We conclude that it was not.

The burden of proof in the calculation of damages was initially on Hernandez who had to establish the damages his injury had caused and was likely to cause in the future. Once Hernandez proved his prior wages in the United States, the burden shifted to Dianella to establish that the use of past wages to calculate future damages was factually improper and, if so, what a proper measure of damages should be. Because Dianella presented no proof that Hernandez was about to be deported or would surely be deported, the court did not err in basing its award on Hernandez's past earnings stream as required by *Culver II*. Dianella is liable to make Hernandez whole for the injury inflicted. It cannot defeat his right to recover by asserting that his award for future lost wages

should be based upon speculation regarding what he might be earning were he in Mexico. Hernandez has now applied for amnesty under the Immigration Reform and Control Act of 1986, but this development is a matter that we need not now consider.

This correction of Part B(ii) of our opinion of March 30, 1988, does not affect our partial affirmance of the district court's use of U. S. wage rates for the calculation of Hernandez's damages.

In all other respects, the petition for rehearing is DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.